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MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY

GREGORY A. CHRISTIAN; *et al.*,

Plaintiffs,

v.

ATLANTIC RICHFIELD COMPANY,

Defendant.

CAUSE NO. DV-08-173

**ORDER GRANTING PLAINTIFFS'
MOTION IN LIMINE (EPA EVIDENCE)**

On October 9, 2013, Plaintiffs moved *in limine* to prohibit ARCO, its counsel, and/or witnesses, from introducing evidence of or making or eliciting any reference to, whether in voir dire examination, opening statement, closing argument, or testimony, concerning administrative regulatory activities of the Environmental Protection Agency (EPA), enforcement provisions of the Comprehensive Response, Compensation, and Liability ACT (CERCLA), ARCO's alleged compliance or cooperation with EPA, expectations of future action pursuant to CERCLA, and any other regulatory matter having no bearing on the Plaintiffs' common law damage claim. ARCO filed a response in opposition on November 4, 2013. The Plaintiffs replied on November 21, 2013.

BACKGROUND

The Plaintiffs filed this action against Defendant Atlantic Richfield Company (ARCO), asserting state common law claims and seeking common law remedies. The

Plaintiffs' claims are not based on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Title 42, Chapter 103, or any other environmental statute administered by the United States Environmental Protection Agency (EPA) or the Montana Department of Environmental Quality (DEQ).

PARTIES' ARGUMENTS

The Plaintiffs contend that EPA's regulatory standards and activities are irrelevant, prejudicial and would confuse the jury in the compensatory phase of trial. The Plaintiffs note that ARCO has hired numerous expert witnesses to testify about EPA regulations and the EPA's orders in regards to the Anaconda Superfund site, presumably to argue to the jury that compensatory damages designed to restore the properties to the condition they were in before the pollution is not appropriate because the EPA did not order such a remedy. However, this trial is not about EPA or ARCO's compliance with EPA or the EPA's process in choosing a remedial course of action. Rather, Plaintiffs' seek remedies under state common law to recover damages to be used to clean up arsenic and other heavy metals deposited on their properties.

Relying primarily on *Sunburst School District No. 2 v. Texaco Inc.*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079, the Plaintiffs argue that in the liability/compensatory damages phase of trial, evidence of EPA's regulatory standards and activities would be irrelevant and inadmissible pursuant to Mont. R. Evid. 402. The Plaintiffs argue that, under Mont. R. Evid. 403, the potential of such evidence to cause unfair prejudice or confusion would substantially outweigh any possible probative value it might have during that phase of trial and further would improperly transform the case into a *de facto* "EPA enforcement action" instead of one based on state common law claims. The

Plaintiffs have acknowledged that the evidence may be admissible during the bifurcated punitive damages phase of trial, as explained in the *Sunburst* decision.

In its November 4, 2013, response, ARCO argues that, as demonstrated by Plaintiffs' reliance on the evidence in defending against summary judgment, the EPA's involvement in the Anaconda Superfund site is directly relevant to many claims and defenses in this case. ARCO argues that, in the nuisance and trespass counts, "[p]laintiffs' entire case on health risks consists of a toxicological critique of EPA's health risk assessment..." and that EPA's regulatory requirements for public communications are relevant to determining a standard of care. Plaintiffs' constructive fraud claim is premised upon communications in which the EPA was "inextricably involved."¹ Plaintiffs should not recover restoration damages unless they convince the jury that EPA will allow them to conduct the proposed work. EPA communications and media reports demonstrate knowledge relevant to when the statute of limitations began to run on Plaintiffs' claims, and EPA's investigation is relevant to whether the alleged contamination is "reasonably abatable" for purposes of a continuing tort.²

ARCO argues further that the evidence is admissible pursuant to Montana statute, Mont. Code Ann. § 75-10-711(9), and that the *Sunburst* doctrine on DEQ evidence only applies to strict liability claims, not the plethora of claims asserted by Plaintiffs. Given the Plaintiffs' claims, ARCO asserts the evidence is relevant and would not be unfairly prejudicial or confusing.

¹ Constructive fraud is no longer at issue in this litigation. It has been dismissed on statute of limitations grounds in a decision upheld on appeal by the Montana Supreme Court. *Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 78, 380 Mont. 495, 358 P.3d 131.

² For the Court to resolve ARCO's other statute of limitations defenses, the jury must decide whether the contamination is reasonably abatable. *Id.*, ¶ 77.

ANALYSIS

The Court first begins with an analysis of *Sunburst* as well as the relatedly important case of *Malcolm v. Evenflo Co. Inc.*, 2009 MT 285, ¶ 44, 352 Mont. 325, 217 P.2d 514. The Court next addresses the application of Mont. R. Evid. 403 as it applies in this case. Finally, the Court will address the applicability of Mont. Code Ann. § 75-10-711(9).

I. The Evidence Is Inadmissible in the Compensatory Damages Phase Pursuant to Established Montana Precedent.

Under governing Montana law, a polluter's attempts to comply with state or federal regulations governing pollution are not relevant to a landowner's claims to be made whole under the common law. *Sunburst School District No. 2 v. Texaco Inc.*, 2007 MT 183, ¶ 80, 338 Mont. 259, 165 P.3d 1079.

In *Sunburst v. Texaco*, the Montana Eighth Judicial District excluded all evidence of DEQ regulatory activity at the site. Pls.' Exh. A, *Sunburst School District No. 2 v. Texaco, Inc.*, Cause No. CDV-01-179A (October 19, 2004). Because the plaintiffs' claims were based on the common law, "MDEQ's actions and opinions based on the statutory requirements of CECRA were [...] not at issue." Such evidence would confuse the jury and improperly allow the defendants "to cloak themselves in the authority of the State of Montana." After a defense witness referenced compliance with regulatory standards, the Court made the scope of its ruling clear:

I would just caution everyone to stay away from it because it's going to cause a problem in the case. EPA, DEQ, are not part of this case. This is a common law action.

Pls.' Exh. B, Transcript on Appeal, pp. 1052-54.

Following a jury verdict in plaintiffs' favor, the defendant argued on appeal it should have been permitted to offer evidence of DEQ's regulatory activity. The Montana Supreme Court disagreed and affirmed exclusion of the evidence:

Evidence of Texaco's after-the-fact negotiations with DEQ in the 1990s and the early 2000s to demonstrate its level of cooperation with state regulators after having caused the contamination would not change the scope of the damage or the cost of removing the contamination from the Sunburst property.

* * * * *

We agree with the District Court that DEQ's role in Texaco's belated attempts to comply with CECRA would not be relevant to Sunburst's claims to be made whole under the common law.

Sunburst, ¶¶ 78, 80.

The Montana Supreme Court observed, "[t]he common law seeks to restore a party to the condition that existed before the injury." *Sunburst*, ¶ 77 (citing *Burk Ranches, Inc. v. State*, 242 Mont. 300, 790 P.2d 443, 447 (1990)). The Court also recognized that restoration damages under the common law are not restricted by regulatory standards:

Thus, we agree with Sunburst that CECRA's focus on cost effectiveness and limits on health-based standards differ from the factors to be considered in assessing damages under the common law. Nothing in CECRA preempts a common law claim that seeks to recover restoration damages to remediate contamination beyond the statute's health-based standards.

Sunburst, ¶ 59. Thus, it is clear that state environmental regulatory activities and a polluter's compliance with them have no relevance to the scope of damages or cost issues relating to clean-up under a state law restoration claim.

This conclusion is also supported by the Montana Supreme Court's treatment of compliance with federal regulatory standards in product liability actions. In *Malcolm v.*

Evenflo Co. Inc., 2009 MT 285, ¶ 44, 352 Mont. 325, 217 P.2d 514, defendant manufacturer sought to introduce evidence that its car seat complied with Federal Motor Vehicle Safety Standards mandated by the National Highway Traffic and Safety Administration. *Id.*, ¶ 8. The District Court excluded the evidence. *Id.*, ¶ 23. On appeal, the Montana Supreme Court affirmed. *Id.*, ¶ 44.

Just as the federal standards in *Malcolm* were not relevant to whether the car seat at issue was safe, so too here, the federal standards ARCO seeks to introduce are not relevant to the safe levels of arsenic on Plaintiffs' property. Such federal safety standards do not define the extent of state common law duties and thus cannot be used as a shield against state common law claims.

To the extent that it is otherwise appropriate to do so, the information may be relevant in the punitive damages phase of the trial. See *Sunburst*, 2007 MT 183, ¶ 83. In *Sunburst*, the Montana Supreme Court acknowledged "the problem of how the District Court could have prevented the jury from hearing evidence of DEQ's role for purposes of compensatory damages, but allowed the jury to hear evidence of DEQ's role for purposes of determining the appropriateness of punitive damages," noting that:

We need not resolve this dilemma, however, as the District Court excluded evidence of DEQ's role for both purposes. We affirmed the District Court's exclusion for purposes of compensatory damages. ... A new jury may consider evidence of DEQ's role for purposes of determining whether Texaco acted with actual fraud or actual malice.

Id., ¶ 86. Here the issue is avoided by bifurcating the compensatory damages phase of trial from the punitive damages phase.

Against this authority, the Court is not persuaded by ARCO's arguments that EPA standards and regulatory proceedings must be considered by the jury in light of Plaintiffs' claims.

II. There Is a Substantial Potential for Prejudice and Confusion by Admitting Such Evidence.

This case is not premised on whatever relevance EPA's regulatory activities or ARCO's activities to comply with CERCLA may have. The evidence poses substantial risk of unfair prejudice or confusion. ARCO's own briefing highlights the misleading, prejudicial and confusing potential for this evidence. Admitting such evidence poses clear risk for ARCO to "cloak itself" in the authority of the federal government. See *Sunburst*, 2007 MT 183, ¶¶ 107, 121 (referring to Texaco's efforts to cloak itself in the authority of the State of Montana and its state environmental regulations). Because EPA's regulatory standards do not apply to the common claims and remedies at issue, such evidence can only distract the jury from the elements of the common law torts asserted here. The Montana Supreme Court, in *Sunburst*, rejected the result of permitting the jury to believe that ARCO's compliance with EPA regulations absolves it of liability under Montana common law. The danger of confusion and prejudice outweighs any probative value of EPA evidence.

III. Mont. Code Ann. 75-10-711(9) Does Not Support a Different Result.

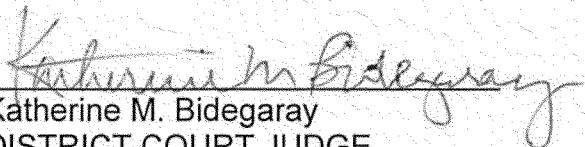
Both parties cite Mont. Code Ann. § 75-10-711(9) in support of their positions. The statute confirms the Court has the discretionary authority to apply the rules of evidence, including Mont. R. Evid. 402 and 403 and the principles enunciated in *Sunburst*. The Court has done so, consistent with its inherent discretion in matters concerning admissibility of evidence, in order to reach the decision here that the

probative value of the disputed evidence is too weak and its potential for prejudice and confusion too great. If otherwise appropriate, the evidence may be admissible in the bifurcated punitive damages phase of trial.

CONCLUSION

For the reasons set forth here, the Court concludes that ARCO is precluded from presenting evidence and argument regarding alleged compliance with EPA requirements, standards, and regulatory proceedings. ARCO may not inform, suggest or imply to the jury that EPA may require some action pursuant to CERCLA, or to suggest that the jury's award should be influenced or based upon collateral regulatory proceedings. Accordingly, Plaintiffs' motion is hereby **GRANTED**.

Dated this 7th day of September, 2016.


Katherine M. Bidegaray
DISTRICT COURT JUDGE